

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

|   |   |                      |
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| In the Matter of                            | ) |                      |
|   | ) |                      |
| Review of the Section 251 Unbundling        | ) | CC Docket No. 01-338 |
| Obligations of Incumbent Local Exchange     | ) |                      |
| Carriers                                    | ) |                      |
|   | ) |                      |
| Implementation of the Local Competition     | ) | CC Docket No. 96-98  |
| Provisions of the Telecommunications Act of | ) |                      |
| 1996  | ) |                      |
|   | ) |                      |
| Deployment of Wireline Services Offering    | ) | CC Docket No. 98-147 |
| Advanced Telecommunications Capability      | ) |                      |

**COMMENTS OF  
OPENBAND OF VIRGINIA, LLC**

OpenBand of Virginia, LLC (“OpenBand”) submits the following comments in response to the Notice of Proposed Rulemaking issued in the above captioned proceedings.<sup>1</sup>

**I. Introduction & Summary**

OpenBand is a wholly owned subsidiary of M.C.Dean, Inc.<sup>2</sup> and a licensed, facilities-based telecommunications carrier in the Mid-Atlantic region. OpenBand offers to consumers “one stop shopping” broadband communications solutions. In particular, OpenBand designs, engineers, constructs, and then utilizes state-of-the-art, broadband networks to provide bundled and converged communications solutions that include high-speed data, voice, video, converged network, consulting, and OSS services.

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<sup>1</sup> See *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98 & 98-147, FCC 01-361, Notice of Proposed Rulemaking (rel. Dec. 20, 2001) (“NPRM”).

<sup>2</sup> M.C. Dean, Inc. is a mid-atlantic company with over 50 years of experience in systems design, integration, construction, and life cycle support.

In the past, OpenBand has tailored and provided its service offerings primarily to business and government customers. In the past year, however, OpenBand has been able to extend its network engineering expertise and converged, broadband service offerings to residential consumers. In particular, OpenBand now teams with land developers and builders to design and build “smart neighborhoods” or “wired communities.” To date, OpenBand has invested over \$15 million in residential broadband facilities at these communities, with over \$25 million more on the immediate horizon.

Drawing from the design and engineering expertise of its parent company, OpenBand provides to new residential communities custom designed, secure communications infrastructure, including, among other things, community-wide fiber-optic backbones, fiber-to-the-home connectivity, and a community-dedicated central office housing state-of-the-art voice, video, and data equipment. Through these facilities, OpenBand is able to provide every community resident a complete, pre-wired package of communications service options, including, but not limited to, local and long distance telephone, analog and digital cable television, 100 mbps, always-on Internet connectivity, digital home security, web-based home automation, and even a community intranet (including connections to local schools). Moreover, these services come with the convenience and efficiency of a single, monthly bill and a single provider with a demonstrated commitment to cutting-edge technology and service quality.

OpenBand believes that in “smart communities” or “wired communities” it has found a competitive, effective, and vital model for the future growth of residential broadband, bundled, and converged service availability. The success of this model, however, lies in part on OpenBand’s ability to connect its community-based, broadband networks to each other and to the outside world (*i.e.*, national and international networks). The primary medium for making

these connections is fiber-based transport facilities, and, in many cases, the most cost efficient and sometimes only viable option for obtaining these facilities is to utilize the existing network of the resident incumbent LEC (*i.e.*, Verizon). The purpose of these comments, therefore, is to encourage the Commission in this proceeding to preserve and bolster its unbundling obligations for ILEC interoffice and dark fiber transport facilities.

## **II. Comments**

### **A. Interoffice Transport**

In the *UNE Remand Order*, the Commission determined for interoffice transport that viable competitive alternatives do not exist for competitors and that competitors are impaired without cost-based access to these ILEC facilities. OpenBand maintains that the Commission's determination is still true in the areas in which OpenBand is now deploying wired community facilities.

In the largely rural and suburban residential markets in which OpenBand now operates, OpenBand still does not, in many cases, have competitive alternatives for obtaining the interoffice transport facilities necessary to connect its wired communities to one another or to outside networks. In these residential areas, the market for transport facilities simply has not matured to a level that provides OpenBand viable options to the ILEC. Indeed, in many places, the ILEC is essentially OpenBand's only option (outside of cost-prohibitive self-deployment) to obtain the last vital link necessary to give residential consumers the full benefit of the sophisticated, community-based broadband networks that OpenBand is actively deploying.

The Commission should again require ILECs to provide access to unbundled interoffice transport. Moreover, the Commission should not impose any limitations on this access (*e.g.*, capacity restrictions) that would in any way destroy opportunities or incentives or preclude or

impair facilities-based, broadband providers like OpenBand from extending innovative and competitive broadband, bundled, and converged service capabilities to residential consumers.

## **B. Dark Fiber Transport**

A related element that OpenBand believes will greatly facilitate and encourage the “smart neighborhood” or “wired community” model is dark fiber transport. In many instances, Verizon has deployed fiber transport facilities running in and around OpenBand wired communities with capacity along a network route that OpenBand desires to serve. The availability of this facility, just like interoffice transport, gives OpenBand the opportunity to avoid the substantial and, at times, competitively prohibitive cost required for deploying what in essence would be a duplicate facility. Moreover, by using available dark fiber, OpenBand avoids the disruption caused by construction while roadways are dug up to lay new facilities.

While OpenBand may ultimately still decide to overbuild an idle Verizon facility for its own network purposes, the ability to make a “buy” vs. “build” decision is a critical element of competition. The importance of this decision was not lost on the Commission in unbundling dark fiber in the *UNE Remand Order*, and it is not something that should be lost in this proceeding. Moreover, the same lack of alternatives in residential markets that calls for the continued unbundling of ILEC interoffice transport (as discussed above) calls for the continued unbundling of ILEC dark fiber. The Commission should, therefore, again require ILECs to provide unbundled access to dark fiber transport in order to facilitate and foster competitive, facilities-based residential broadband deployment.

The Commission should also use this opportunity to bolster its existing dark fiber rules. In particular, the Commission is not the only one to recognize the competitive importance of unbundling ILEC dark fiber. The ILECs also recognize its importance. Because of this,

OpenBand has found that while ILECs tacitly purport to make dark fiber available on a nondiscriminatory basis, they have, in practice, shielded dark fiber from competitors behind a host of unnecessary and unlawful barriers. Indeed, despite the Commission's best efforts in the *UNE Remand Order*, in OpenBand's experience, ILECs have made the right to obtain unbundled dark fiber almost entirely illusory.

## **1. Dark Fiber Termination**

One of the primary examples of ILEC barriers to dark fiber is by not making available in-place, spare fiber facilities that have been left un-terminated (or at some other stage of installation that leaves the fiber one simple step away from use). The following language from a recent version of Verizon's multi-state template interconnection agreement proposal is an illustrative example of this ILEC limitation:

Dark Fiber Loops, Dark Fiber Sub-Loops and Dark Fiber [Transport] are not available to [CLEC] unless such Dark Fiber Loops, Dark Fiber Sub-Loops or Dark Fiber [Transport] already are terminated . . . Unused fibers located in a cable vault or a controlled environmental vault, manhole or other location outside the Verizon Wire Center, and not terminated to a fiber patch panel, are not available to [CLEC].<sup>3</sup>

The purported basis for this "termination" requirement is that under the Commission's *UNE Remand Order* definition of dark fiber, dark fiber must "connect two points within the incumbent LEC's network" and be "installed and easily called into service."<sup>4</sup> If, therefore, an ILEC installs spare fiber facilities, but chooses not to terminate the fiber until the ILEC desires to use it, the facilities are not available to CLECs. This is a patent manipulation of the Commission's rules creating a substantial barrier to the availability of dark fiber.

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<sup>3</sup> See Verizon Multistate Interconnection Agreement Template Proposal, v2.2-083101 at § 8.2.2.

<sup>4</sup> See *UNE Remand Order* at ¶ 325.

As an initial matter, it cannot be said that a termination requirement naturally flows from the Commission's *UNE Remand Order* definition of dark fiber. In particular, the fact that fiber facilities are not physically connected to a termination frame or other facility does not mean that they still do not connect two points within an ILEC's network. Fiber facilities still form an uninterrupted pathway between two locations in an ILEC's network whether or not the ends of that pathway are attached to a frame or other facility at those locations. In addition, the termination of fiber is an inherently simple and speedy task. It cannot fairly be argued that un-terminated fiber is not "installed and easily called into service." Indeed, it is completely disingenuous to say that fiber is not "installed and easily called into service" when a competitor asks for it, but is readily available (after a marginal work) when the ILEC wants to use it.

Interpretation aside, the primary problem with the ILEC's termination requirement is that it would allow (and, in OpenBand's experience, has allowed) ILECs to render dark fiber unbundling obligations completely meaningless. Simply put, by requiring termination, an ILEC can unilaterally insulate every strand of spare fiber in its network from use by a competitor by simply leaving it un-terminated until the ILEC wants to use it. This is surely not what the Commission intended in the *UNE Remand Order*, but it is a very real obstacle and ILEC practice that faces competitive providers like OpenBand every day.

Last year, the Public Utility Commission of Texas tackled the termination requirement in an interconnection arbitration involving Southwestern Bell Telephone Company ("SWBT").<sup>5</sup> In the resulting arbitration award, Texas PUC arbitrators flatly rejected the requirement. The arbitrators rejected the notion that fiber does not connect two points in a network simply because

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<sup>5</sup> See *Joint Petition of CoServ, LLC dba CoServ Communications and MultiTechnology Services, LP dba CoServ Broadband Services for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Southwestern Bell Telephone Company*, Arbitration Award, Docket No. 23396 (April 17, 2001) ("*Arbitration Award*"). Relevant excerpts from the *Arbitration Award* are provided in Attachment A.

it is not terminated. Substantial evidence and testimony in the record also demonstrated that termination only required less than one day or night's work to perform and that the termination of fiber at the time it is installed is infinitely more efficient than piece-meal termination thereafter. The arbitrators, therefore, also concluded that in-place, spare fiber that was not terminated was nevertheless "installed and easily called into service" consistent with the Commission's *UNE Remand Order* definition of dark fiber.

In accordance with these determinations, the Texas PUC arbitrators adopted the following contract language, specifying that SWBT's dark fiber unbundling obligations do not turn on whether or not fiber is terminated:

In SBC-12STATE dark fiber is deployed, unlit fiber optic cable that connects two points within the incumbent LEC's network. Dark fiber is fiber that has not been activated through connection to the electronics that "light it", and thereby render it capable of carrying communications services. Dark fiber also includes unlit fiber optic cable that has not yet been terminated on an LGX or FDI panel or other appropriate device.<sup>6</sup>

In instances where a CLEC requests dark fiber from SWBT that is not terminated, the arbitrators adopted a simple mechanism in which SWBT will terminate the fiber on the requesting CLEC's behalf subject to the recovery of all reasonable costs for doing so from the CLEC. The following approved language reflects this equitable arrangement:

SBC-12STATE will make available to CLEC dark fiber facilities based on the facilities cross-section of all fibers between "A" and "Z" locations regardless as to whether the fiber is terminated or not. If dark fiber is not terminated, SBC-12STATE will terminate the fiber, and CLEC will pay SBC-12STATE's reasonable costs in connection with such activities.<sup>7</sup>

The rejection of SWBT's termination requirement by the Texas PUC was entirely necessary and appropriate to preserve dark fiber as a meaningful competitive option for CLECs

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<sup>6</sup> See *Arbitration Award* at 116.

<sup>7</sup> See *Arbitration Award* at 116.

in Texas. Unfortunately, the termination requirement is an obstacle that goes beyond the borders of Texas or the business practices of SWBT. As demonstrated in the Verizon language provided above, the termination requirement is a national problem that requires national attention. Competition cannot afford for fundamental barriers like the termination requirement to be broken down one state at a time. The Commission should, therefore, use this proceeding to reject a termination requirement or any other similar impediment to the availability of dark fiber and adopt clear guidelines like those created by the Texas PUC.

## **2. Dark Fiber Information**

Another primary example of an ILEC barrier to dark fiber is ILEC refusals to provide timely or usable information on the location of dark fiber in their networks. Typically, an ILEC will only inform a competitor whether dark fiber is available between two locations if the competitor specifically inquires about the particular route. The following provision from a recent version of Verizon's multi-state template interconnection agreement provides a description of this typical process:

A Dark Fiber Inquiry must be submitted prior to submitting an ASR. Upon receipt of the completed Dark Fiber Inquiry, Verizon will initiate a review of its cable records to determine whether Dark Fiber Loop, Dark Fiber Sub-Loop or Dark Fiber [Transport] may be available between the locations and in quantities specified. Verizon will respond within (15) Business Days from receipt of the [CLEC's] request, indicating whether Dark Fiber Loop, Dark Fiber Sub-Loop or Dark Fiber [Transport] may be available based on the records search.<sup>8</sup>

If the ILEC responds that there is no dark fiber available for the route requested, there is no way for the competitor to question or confirm the ILEC's determination. Moreover, the ILEC may deny that dark fiber exists between two locations based on the competitor's route request, but there may still be an alternative route that the ILEC does not disclose. Competitors like OpenBand, therefore, are relegated to guesswork and a virtual "shell game" with the ILEC. An

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<sup>8</sup> See Verizon Multistate Interconnection Agreement Template Proposal, v2.2-083101 at § 8.2.5.

ILEC's piecemeal disclosure of the location and availability of dark fiber also leaves competitors without any effective information source to include dark fiber in any of its long term network planning. This guesswork also extends to the competitor's network forecasting. In short, competitors like OpenBand need to know where dark fiber is in an ILEC's network in order to have any meaningful opportunity to use it.

In the same Texas proceeding noted above, the Texas PUC also addressed a SWBT proposal to provide dark fiber information to CLECs in the same manner described above. Again, Texas PUC arbitrators flatly rejected SWBT's proposal. The arbitrators recognized the inefficiencies, discrimination, and potential abuse inherent in forcing CLECs to rely on SWBT record searches for dark fiber information. The arbitrators, therefore, required SWBT to let a CLEC access SWBT plant location records itself, as reflected in the following approved contract language:

To determine the actual fibers available, SBC-12STATE will allow CLEC to access the Plant Location Records (PLR) to ascertain a count of the total installed fibers between the "A" and "B" locations. If necessary SBC-12STATE will then provide information from the Trunks Integrated Records Keeping System (TIRKS), or any equivalent system, prepared by SBC-12STATE personnel to identify the total number of (lit) fibers in service.<sup>9</sup>

The arbitrators also instructed the parties to the arbitration to negotiate and include language in their interconnection agreement that reflected the following guidelines:

1. SWBT will provide [CLEC] access to PLRs indicating the location of fiber. This access must be reasonable and no different than what it provides to other CLECs.
2. In instances where the PLRs do not show the most recently completed fiber jobs in a requested geographic area, SWBT is instructed to advise [CLEC] of what facilities have been deployed but are not reflected in the PLRs.

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<sup>9</sup> See *Arbitration Award* at 117.

3. Additionally, SWBT shall provide [CLEC] reports from the TIRKS database prepared by SWBT within 5 business days of a [CLEC] request. SWBT and [CLEC] shall abide by confidentiality agreements aimed at preventing either party from inappropriately using the competitively sensitive information shared between them. Within 90 days from the date of this order, SWBT and [CLEC] shall jointly file a report concerning the procedures that they have put in place to protect customer-specific dark fiber information.<sup>10</sup>

As with the termination requirement, OpenBand encourages the Commission to adopt the same or similar standards for dark fiber information as those adopted by the Texas PUC. OpenBand, and many other similarly situated competitive providers in the nation, are faced with the same inefficient and anticompetitive process for obtaining dark fiber information as that rejected in Texas. Simply put, to use dark fiber, competitors must know where it is. Existing ILEC procedures for providing dark fiber information are woefully inefficient, discriminatory, and are ripe for ILEC abuse. OpenBand, therefore, encourages the Commission to adopt national guidelines similar to those provided by the Texas PUC, clarifying that a necessary component of dark fiber requirements is to give competitors nondiscriminatory access to necessary plant location records and any other information that will allow a competitor to itself determine where dark fiber is available in the ILEC's network.

In sum, the Commission should not only reaffirm the unbundled availability of dark fiber, it should bolster this obligation by ensuring that ILEC barriers to dark fiber are eliminated and that competitive providers like OpenBand are given a meaningful opportunity to access and use this important network element.

### **C. UNE Combinations**

A final aspect of ILEC unbundling obligations that is important to OpenBand in deploying broadband, bundled, and converged services to wired communities is UNE

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<sup>10</sup> See *Arbitration Award* at 122-123.

combinations. In particular, in some cases, OpenBand expects that it will require combinations of interoffice transport, and perhaps other network elements, in order to connect its community-based, broadband networks to each other and to outside networks. OpenBand, therefore, encourages the Commission to ensure in this proceeding that OpenBand will not have to face the same tired obstacles that ILECs have traditionally placed in the way of obtaining UNE combinations.

Initially, the Commission should reaffirm its requirement that an ILEC may not separate UNEs that the ILEC currently combines. This common sense requirement was created by the Commission in its original interconnection rules, affirmed by the U. S. Supreme Court, and reaffirmed by the Commission in the *UNE Remand Order*. There is still no valid reason to let an ILEC take apart its network simply to force a competitor to put it back together again.

Beyond converting existing combinations, OpenBand encourages the Commission to follow the lead of a number of state commissions and, indeed, its own instincts in the *UNE Remand Order*, to re-institute obligations requiring an ILEC to affirmatively combine network elements on behalf of competitive providers. As these state commissions, as well as the Commission itself, have recognized, the Supreme Court's decision in *AT&T v. Iowa Utils. Bd.* inherently undercuts any questions about the Commission's authority to impose UNE combination obligations beyond simply preserving existing UNE combinations. The Commission should, therefore, use this opportunity to empower broadband providers like OpenBand to have ILECs combine transport links for OpenBand without the inefficiency, extraordinary cost, and anticompetitive delay of collocation.

In OpenBand's experience, re-instituting the full panoply of the Commission's original UNE combination obligations is very important. As noted above, it will curtail the inherent

problems, inefficiencies, and abuses that ILECs have inflicted through arduous and unnecessary collocation requirements. In addition, the availability of UNE combinations will facilitate the deployment of broadband services and facilities by OpenBand, as well as similarly situated providers, by allowing them to connect and coordinate wired communities affordably and efficiently. Finally, in the wake of the uncertainty surrounding the Commission's UNE combination rules for the past few years, state commission regimes have become increasingly divergent, making it extremely difficult for competitors like OpenBand to fashion a uniform strategic plan for the deployment of broadband and other advanced services facilities. The re-institution of national combinations standards will curtail this problem by coordinating these state commission regulatory efforts.

In sum, OpenBand should no longer be saddled with the unavailability of efficient, cost-based UNE combinations because of uncertainty, inefficiency, or arguments designed simply to facilitate ILEC foot-dragging. The Commission should re-institute its UNE combination obligations to enable facilities-based, broadband providers like OpenBand to affordably and efficiently deploy competitive and innovative broadband, bundled, and converged services to residential consumers.

### **III. Conclusion**

OpenBand believes that the promising competitive area of "smart neighborhoods" or "wired communities" will significantly and particularly benefit from the availability of transport and fiber options. Wired community providers install the extensive and expensive infrastructure to wire the last mile and provide true broadband solutions, offering perhaps the best hope of increasing the number of residential broadband subscribers. The Commission should ensure that future ILEC unbundling obligations facilitate and foster this model by offering to providers like

OpenBand ready access to ILEC interoffice transport, dark fiber transport, and UNE combinations.

OpenBand looks forward to offering further details in the course of this proceeding.

Respectfully submitted,

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## **ATTACHMENT A**

**LL. DPL ISSUE NO. 38**

**SWBT: Whether SWBT must provide CoServ access to unterminated dark fiber in all remote terminals as a UNE. Whether the dark fiber UNE includes unlit fiber optic cable that has not yet been terminated in a LGX or FDI panel.**

**COSERV: Whether SWBT will be permitted to so restrictively define and make available dark fiber so as to render its availability in the contract illusory and meaningless.**

***(a) CoServ's Position***

It was CoServ's position that unterminated dark fiber is "in place" or "easily called into service". CoServ believed that SWBT erroneously concluded that unterminated dark fiber does not meet the FCC's definition of dark fiber because it is not "in place and easily called into service."<sup>1</sup> CoServ pointed out that SWBT's own witness testified that unterminated fiber is "easily called into service" when he explained that it would take only one day or one night to terminate unterminated dark fiber.<sup>2</sup> Therefore, because unterminated dark fiber is fiber that has not been activated through connection to electronics that light it and it is in place and easily called into service, it falls squarely within the FCC's definition of what constitutes "dark fiber". Consequently, CoServ argued, SWBT is required to provide both unterminated and terminated dark fiber to CoServ under the *UNE Remand Order*.<sup>3</sup>

According to CoServ, the limitation to Pronto sites is completely artificial and has no basis in network engineering or technical feasibility. CoServ argued that if this is appropriate at Pronto sites, there is no reason it would not be appropriate at other sites.<sup>4</sup> CoServ believed that there is no valid reason why SWBT should be able to pick and choose particular sites to unilaterally decide whether it will choose to terminate unterminated dark fiber.

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<sup>1</sup> CoServ Initial Post-Hearing Brief at 62, citing SWBT Ex. 2 at 26.

<sup>2</sup> *Id.* at 63, citing Tr. at 198, lines 18-25.

<sup>3</sup> *Id.* at 63.

<sup>4</sup> CoServ Ex. 6, Walker Rebuttal, at 14-15.

CoServ also argued that it was generally more efficient and cost-effective to terminate all of the fiber in a transmission route at one time.<sup>5</sup> CoServ did not agree with SWBT's position that it is under no obligation to provide unbundled access to dark fiber that it has run between locations in its network if SWBT has not terminated the dark fiber at each location.

CoServ expressed the belief that, under SWBT's current construction practices, SWBT only terminates fiber that it needs at the time, leaving the remaining idle fiber strands unterminated, and therefore unavailable to competitors like CoServ.<sup>6</sup> CoServ argued that the contract provisions proposed by SWBT would allow SWBT to manipulate the system by simply leaving dark fiber unterminated. CoServ argued that SWBT could unterminate existing fiber that was terminated to keep it out of the hands of SWBT's competitors.<sup>7</sup>

CoServ did not agree with SWBT's argument that it was not attempting to avoid providing CoServ the same information and provisions regarding dark fiber provided to Waller Creek in accordance with Docket No. 17922. CoServ maintained that this Commission in the Waller Creek arbitration carefully and thoughtfully ordered a number of important competitive protections to insure that such dark fiber availability was meaningful. CoServ argued that SWBT does not point to anything in the FCC's UNE Remand Order that undercuts the Waller Creek award. CoServ believed that the FCC's Order seemed to underscore and bolster the importance of this Commission's order in Waller Creek because it demonstrated the FCC's recognition of the importance of dark fiber on a national basis to the development of competition in the marketplace.<sup>8</sup>

CoServ asserted that the right to obtain dark fiber was illusory if an incumbent LEC can leave dark fiber unterminated and then refuse to make such dark fiber available to CLECs.<sup>9</sup>

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<sup>5</sup> CoServ Ex. 5, Walker Direct, at 5.

<sup>6</sup> *Id.*

<sup>7</sup> CoServ Ex. 6, Walker Rebuttal, at 15-16.

<sup>8</sup> *Id.* at 16.

<sup>9</sup> CoServ Ex. 5, Walker Direct, at 6.

As a result, CoServ proposed to list specific dark fiber segments in SWBT's network that would be available to CoServ, including interoffice fiber and feeder and distribution loop fiber facilities to remote terminals, remote switching modules, and customer locations.<sup>10</sup>

CoServ proposed that SWBT allow CoServ, where technically feasible, to terminate the fiber using appropriately approved and safe practices and technicians in accordance with industry standards and at its expense. In the alternative, CoServ argued that its proposal to require SWBT to terminate the fiber and splice through any unspliced segments to establish A-to-Z continuity for CoServ's use, subject to the full cost reimbursement from CoServ, is accordance with the standards of the Act and the Commission's rules.<sup>11</sup>

CoServ argued that the Commission should consider fusion joints and termination of dark fiber as two separate issues. CoServ did not believe that it would be necessary to open a splice case to allow a fusion splice between CoServ's fiber and SWBT. CoServ explained that Litespan RTs have a "fiber splice tray" where fusion joints can and are made safely and easily. CoServ argued that this can be ordered separately and installed in the field after the RT is in service if the tray was not part of the initial installation.<sup>12</sup>

CoServ argued that the supposed availability of dark fiber does nothing if reasonable advanced information about its location is not provided to CoServ. CoServ stated that this Commission has already agreed with this position in the *Waller Creek* arbitration case. CoServ argued that, in order to utilize dark fiber and incorporate its use into its business plans, it must be able to know where and how it presently exists in the network in order to develop its business and network plans.

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<sup>10</sup> *Id.* at 9.

<sup>11</sup> *Id.* at 5-6.

<sup>12</sup> CoServ Ex. 6, Walker Rebuttal, at 15.

*(b) SWBT's Position*

SWBT argued that it is only obligated to provide access to unterminated dark fiber at Pronto NGDLC (Next Generation Digital Loop Carrier) remote terminals. Otherwise, consistent with the FCC's mandate in ¶ 328 of the UNE Remand Order, SWBT stated that it is only obligated to provide dark fiber as a UNE if the fiber connects two points in SWBT's network. SWBT also stated that it does not have an obligation to provide access to unlit fiber optic cable that has not yet been terminated. In the UNE remand Order, the FCC stated that in order to be considered the dark fiber UNE, the fiber must connect two points in the network.<sup>13</sup>

SWBT noted that CoServ based its request and arguments on the Arbitration Award from the SWBT/Waller Creek arbitration, Docket No. 17922. SWBT argued that the arbitration award in Docket No. 17922 preceded the FCC's rendering of its UNE Remand Order, which first defined the dark fiber product as a UNE and that the requirements of providing a dark fiber UNE were not effective until May 17, 2000.<sup>14</sup> According to SWBT, the FCC made the decision that the dark fiber that must be made available is in place or deployed, unlit fiber optic cable. Therefore, SWBT argued that CoServ's proposal to expand the definition to include dark fiber that is not terminated exceeds the requirements of the FTA and the FCC's definition.<sup>15</sup> SWBT claimed its definition of dark fiber is not limiting, or conflicting with law. Rather, it properly reflected the FCC's interpretation of the required UNE offering.<sup>16</sup>

Further, SWBT argued that the FCC, in Docket No. 98-141, determined that SBC would be required to terminate fiber in those remote terminals or adjacent cabinet structures where Next Generation Digital Loop Carrier (NGDLC) has been deployed that will support both POTS and xDSL services. SWBT pointed out that the FCC explicitly limited SWBT's requirement to those locations where NGDLC has been deployed to provide both POTS and xDSL services.<sup>17</sup>

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<sup>13</sup> Jt. Ex. 1, DPL, at Issue 38.

<sup>14</sup> SWBT Ex. 2, Gonterman Direct, at 25.

<sup>15</sup> *Id.* at 26-27.

<sup>16</sup> SWBT Ex. 8, Gonterman Rebuttal, at 7.

<sup>17</sup> SWBT Ex. 2, Gonterman Direct, at 27.

SWBT expressed its concern that CoServ may be suggesting that a splice be made at Optical Digital Signal Cross Connect panels (LGX panels) that are designed to connect terminated fibers to one another through the use of fiber patch cords/fiber cross connects that also have terminations on them. According to SWBT, these panels are not designed for splicing fiber optic strands within cables to other fiber optic strands within cables.<sup>18</sup> It was SWBT's contention that splicing fibers at points not designed for splicing could have serious implications on the reliability of both the spliced fiber connection CoServ seeks, as well as unrelated terminated fiber connections for other CLEC and SWBT services.<sup>19</sup>

SWBT argued that if it were required to provide CoServ access at splice cases, it could take hours of preparation time (i.e., pumping water out of manholes, ventilating manholes) before the splice cases could be accessed. Since splice cases are not designed for frequent reentry, much time is spent opening these cases, in order to attempt to protect the fiber that is contained within. SWBT asserted that every time work is done in one of these splice cases there is a risk of damaging the exposed and delicate fibers that are normally protected by the cable sheath and splice cases.<sup>20</sup> SWBT explained that in addition to the technical complications and risks associated with removing a splice case to gain access to individual fiber strands, such requirement does not comply with the FCC's ILEC obligations encompassed by Section 251(c)(3) of the Act.<sup>21</sup>

SWBT explained that Fiber Distribution Frames (FDFs) are designed for easy access for connecting and testing fibers. These frames have Optical Digital Cross Connect Panels (LGX panels) that have optical termination points for easy and reliable connection to the fiber. SWBT asserted that these are readily accessible, and are usually in controlled environments. The panels

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<sup>18</sup> SWBT Ex. 4, Oyer Direct, at 7.

<sup>19</sup> *Id.* at 7.

<sup>20</sup> *Id.* at 8.

<sup>21</sup> SWBT Ex. 2, Gonterman Direct, at 28.

are used to connect SWBT's terminated fiber to other terminated fibers, as well as to multiplexing equipment.<sup>22</sup> SWBT maintained that these panels and connections make logical demarcation points, so that trouble can be quickly and easily isolated into the respective networks and installation work can be performed without jeopardizing other services.<sup>23</sup>

SWBT stated that its current policy with respect to the termination of dark fiber is to terminate all fiber building entrance facilities on a fiber termination panel. This includes fiber placed into RT locations, controlled environment vaults and at customer premises. SWBT stated that it does not deliberately leave fiber unterminated to render it unavailable to CLECs.<sup>24</sup>

Further, SWBT asserted it has agreed to terminate dark fiber in limited circumstances. As a voluntary commitment to the FCC in the Merger Conditions related to Project Pronto, SBC committed, in response to a completed SCA, to terminate available spare fiber for CLECs where the ILEC has deployed a NGDLC architecture that supports both voice and DSL. The only Remote Terminal (RT) locations that have such capabilities are the RTs associated with Project Pronto.<sup>25</sup> SWBT stated that CoServ sought to unreasonably expand this voluntary commitment by requiring SWBT to terminate dark fiber at all RT locations.<sup>26</sup>

SWBT claimed that CoServ's proposal would deprive SWBT of the ability to strategically plan its network as far as determining where to deploy its fiber and in what quantities to terminate that fiber. Additionally, SBT argued, CoServ's proposal would force SWBT to utilize inefficient deployment strategies in its network that are dictated by CLEC demands. SBWT argued that this would dissuade it from deploying any fiber in its network if

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<sup>22</sup> SWBT Ex. 4, Oyer Direct, at 9.

<sup>23</sup> *Id.*

<sup>24</sup> SWBT Ex. 10, Oyer Rebuttal, at 3.

<sup>25</sup> SWBT Ex. 4, Oyer Direct, at 11.

<sup>26</sup> *Id.*

those facilities could not be configured in an efficient manner to achieve SWBT's ultimate deployment strategy.<sup>27</sup>

***(c) Arbitrators' Decision***

*Before ruling on this issue, it is necessary to first determine what constitutes dark fiber UNE. First, the FCC found in the UNE Remand Order that LECs must provide access to unbundled loops to help promote competition. Specifically, the FCC states:*

We conclude that LECs must provide access to unbundled loops, including high-capacity loops, nationwide. We find that requesting carriers are impaired without access to loops, and that loops include high-capacity lines, dark fiber, line conditioning, and certain inside wire. Requiring carriers to obtain loops from alternative sources would materially raise costs, delay broad-based entry, and limit the scope and timeliness of the competitor's service offerings.<sup>28</sup>

*The FCC then modified the loop definition to include dark fiber.*

We also modify the loop definition to specify that the loop facility includes dark fiber. Dark fiber is fiber that has not been activated through connection to the electronics that "light" it, and thereby render it capable of carrying communications services. Because it is in place and easily called into service, we find that dark fiber is analogous to "dead count" or "vacant" copper wire that carriers keep dormant but ready for service. ...We find, therefore, that dark fiber and extra copper both fall within the loop network's element's "facilities, functions, and capabilities."<sup>29</sup>

*The Arbitrators find that the combination of these two decisions demonstrates that part of the underlying intention of the FCC was to make dark fiber UNE more accessible to competitors. The Arbitrators believe the FCC attempted to make ILEC dark fiber readily accessible to CLECs in order to foster competition.*

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<sup>27</sup> SWBT Ex. 10, Oyer Rebuttal, at 3.

<sup>28</sup> UNE Remand Order at ¶ 165.

<sup>29</sup> *Id.* at ¶ 174.

*The Arbitrators further rely on Paragraph 325 of the UNE Remand Order to define dark fiber. Specifically, the FCC states:*

[D]ark fiber is fiber which has not been activated through connection to the electronics that “light” it and render it capable of carrying telecommunications services. To provide additional capacity, new electronics are attached to previously “lit” fiber or to previously “dark” fiber. Because dark fiber is already installed and easily called into service, we find that it is similar to the unused capacity of other network elements, such as switches or “dead count” or “vacant” copper wire that is dormant until carriers put it in service.

*SWBT interprets the above order to mean that fiber must be “terminated” to constitute dark fiber. The Arbitrators disagree. The FCC clearly defined dark fiber to include that fiber which “is in place and easily called into service.” The Arbitrators find that the evidence supports a holding that dark fiber which is deployed but not yet terminated is also dark fiber that can easily be called into service.*

*SWBT also relied on Paragraph 328 of the UNE Remand Order. Specifically, the FCC states:*

We acknowledge that it would be problematic if some facilities that the incumbent LEC customarily uses to provide service were deemed to constitute network elements (e.g., unused copper wire stored in a spool in a warehouse). Defining such facilities as network elements would read the ‘used in the provision language’...too broadly. Dark fiber, however, is distinguishable from this situation in that it is physically connected to the incumbent’s network and easily called into service. Thus, as indicated above, we conclude that dark fiber falls within the statutory definition of a network element.”

*The Arbitrators again find that SWBT incorrectly interprets the FCC’s intention. SWBT states that, consistent with the FCC’s mandate in Paragraph 328, it is only obligated to provide dark fiber as a UNE if the fiber connects two points in SWBT’s network.<sup>30</sup> The Arbitrators, however, agree with CoServ’s argument that “connectivity does not equal termination.”<sup>31</sup> Consequently, the Arbitrators find that the UNE Remand Order discussed connectivity in the*

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<sup>30</sup> Jt. Ex. 1, DPL, at Issue 38.

<sup>31</sup> CoServ Reply Brief at 26.

*context of distinguishing dark fiber that was already “in place and called into service” from the example of unused copper wire “stored in a spool in a warehouse.”<sup>32</sup>*

*SWBT also relies on Paragraph 324 of the UNE Remand Order. Specifically, the FCC states:*

Notwithstanding the fact that we require incumbents to unbundle high-capacity transmission facilities, we reject Sprint’s proposal to require incumbent LECs to provide unbundled access to SONET rings. In the Local Competition First Report and Order, the Commission limited an incumbent LEC’s transport unbundling obligation to existing facilities, and did not require incumbent LECs to construct facilities to meet a requesting carrier’s requirements where the incumbent LEC has not deployed transport facilities for its own use. Although we conclude that an incumbent LECs unbundling obligation extends throughout its ubiquitous network, including ring transport architectures, we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not yet deployed for its own use.

*SWBT argues that it is not required to construct facilities as a result of terminating fiber for CoServ. The Arbitrators find that terminating dark fiber does not constitute constructing new transport facilities. The UNE Remand Order addresses the issue of constructing additional facilities in the context of meeting a requesting carrier’s requirements where the ILEC has not deployed transport facilities for its own use. The Arbitrators find that CoServ is not asking for SWBT to construct additional facilities. CoServ is only asking for access to dark fiber in those facilities that SWBT has already deployed.*

*Further, SWBT contended that the FCC’s Pronto Order limits SWBT’s obligation to terminate fiber and make it available as dark fiber only in those places where it has provisioned Pronto along with xDSL and POTS.<sup>33</sup> Specifically, the FCC states:*

Where SBC/Ameritech deploys new fiber feeder facilities to support a NGDLC architecture that supports both POTS and xDSL services and in response to a completed SCA, the SBC/Ameritech incumbent LECs will terminate available

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<sup>32</sup> *Id.*

<sup>33</sup> Tr. at 214.

spare dark fiber for telecommunications carrier(s) having equipment located at such remote terminal sites or adjacent cabinet structures consistent with applicable Commission rules.<sup>34</sup>

*The Arbitrators notice that the Pronto Order only addresses issues related to sites relevant in Project Pronto. The Pronto Order does not limit SWBT in any way as far as termination of dark fiber at sites other than those where it has provisioned Pronto along with xDSL and POTS. The Arbitrators find that SWBT has not provided sufficient evidence supporting its position to not terminate fiber in addition to those places where it has provisioned Pronto. Consequently, the Arbitrators find that SWBT is not technically limited in its ability to terminate dark fiber at other sites.*

*The Arbitrators also find that simply because the Waller Creek Arbitration Award preceded the FCC's UNE Remand Order, does not render any of the decisions in that award with regard to dark fiber inconsequential. In fact, the Arbitrators find that the decisions reached in the Waller Creek Arbitration can aid in the decision of what constitutes dark fiber UNE.*

*In the Waller Creek Arbitration, "SWBT's witness testified, however, that dark fiber requests have been denied because there was 'zero dark fiber'. SWBT also agreed to modify its definition of 'dark fiber' to include un-terminated dark fiber placed in SWBT's outside plant which appears to have alleviated those fiber rejections."<sup>35</sup>*

*The Arbitrators notice that both parties have agreed that terminating all fibers at the same time is efficient and cost-effective.*

*Relying on the reasoning above, the Arbitrators conclude that SWBT be required to include unterminated fiber as dark fiber.*

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<sup>34</sup> Pronto Order, Appendix A at 40.

<sup>35</sup> Waller Creek, at 13.

*Regarding the issue of splicing, the Arbitrators disagree with CoServ's request to seek broad rights to splicing. Splicing, as requested by CoServ, creates the risk of impairment to the telecommunications services of others since the activity risks cutting lit fiber in use by others. In Waller Creek, the Arbitrators relied on Commission precedent broadly requiring cross-connects, including fiber cross-connects, to be provisioned at a termination point in a hut, controlled environment vault, or cabinet.<sup>36</sup> Therefore, the Arbitrators rule that Commission precedent regarding splicing be followed in this proceeding.*

*Based on the preceding analysis, the Arbitrators propose the following contract language:*

8.16.3 In response to a completed SCA, SBC-12STATE will terminate dark fiber where fiber optic cable has been deployed in conjunction with SBC's "Project Pronto" at NGDLC remote terminals. This provision only applies if the "Pronto" fiber has been spliced in all segments and terminated in the Central Office but left un-terminated in the remote terminal.

13.1 In SBC-12STATE Dark fiber is deployed, unlit fiber optic cable that connects two points within the incumbent LEC's network. Dark fiber is fiber that has not been activated through connection to the electronics that "light it", and thereby render it capable of carrying communications services. Dark fiber also includes unlit fiber optic cable that has not yet been terminated on an LGX or FDI panel or other appropriate device. Other than as specifically set out elsewhere in this agreement, SNET does not offer Dark Fiber under this agreement. Rather, Dark Fiber is available as described in Section 18.2.1E of the Connecticut Service Tariff.

13.1.1 Access to dark fiber includes access to unlit fiber available between two specific points within the SBC-12STATE network. This includes interoffice fiber, feeder and distribution loop fiber facilities to digital loop carrier remote terminals (DLC-RT) (regardless of whether the RT is associated with "Project Pronto" or not), remote switching modules (RSMs), and to customer locations. Dark Fiber is fiber that is spliced in all segments from end to end and would provide continuity or "light" end to end. CLEC may only subscribe to dark fiber that is considered "spare," as defined in Sections 13.4.1 and 13.5.1, below.

13.1.2 SBC-12STATE will make available to CLEC dark fiber facilities based on the facilities cross-section of all fibers between "A" and "Z" locations regardless as to whether the fiber is terminated or not. If dark fiber is not terminated, SBC-12STATE will terminate the fiber, and CLEC will pay SBC-12STATE's reasonable costs in connection with such activities.

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<sup>36</sup> *Id.* at 30.

13.1.3 To determine the actual fibers available, SBC-12STATE will allow CLEC to access the Plant Location Records (PLR) to ascertain a count of the total installed fibers between the “A” and “B” locations. If necessary SBC-12STATE will then provide information from the Trunks Integrated Records Keeping System (TIRKS), or any equivalent system, prepared by SBC-12STATE personnel to identify the total number of (lit) fibers in service.

**MM. DPL ISSUE No. 39**

This DPL issue, involving UNE Appendix §§ 9.1 and 9.2.6, relating to ECS as voluntary offering, has been resolved by the parties.<sup>37</sup>

**NN. DPL ISSUE No. 40**

**Whether SWBT must provide CoServ detailed dark fiber inventory information.**

***(a) CoServ’s Position***

CoServ argued that SWBT refuses to tell CoServ where its dark fiber is located. CoServ argued that if SWBT responds that there is no dark fiber available for the route requested, there is no way for CoServ to question or confirm SWBT’s determination. CoServ opined that this becomes particularly problematic due to SWBT’s policy of not considering unterminated dark fiber or fibers that have not been spliced through to be dark fiber. In addition, CoServ argued that SWBT may deny the availability of dark fiber between two locations based on CoServ’s route request, but there still may still be an alternative route that SWBT does not disclose.<sup>38</sup>

CoServ asserted that SWBT’s piecemeal disclosure of the location and availability of dark fiber leaves CoServ without any effective information source to include dark fiber in any of its long term network planning. CoServ proposed that SWBT provide it with access to necessary plant location record and other information that will allow CoServ to determine for itself where available dark fiber is located in SWBT’s network. CoServ believed that it should not have to rely on SWBT to respond to individual inquiries about dark fiber routes, nor rely on the

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<sup>37</sup> See Jt. Ex. 1, DPL.

<sup>38</sup> CoServ Ex. No. 5, Walker Direct, at 7-8.

unverified and undocumented representations of what is essentially its largest competitor in order to have meaningful access to unbundled dark fiber.<sup>39</sup>

CoServ did not agree with SWBT's position that CoServ's proposal would require SWBT to provide privileged and confidential information about dark fiber inventory, asserting that all CoServ sought was reasonable information about where dark fiber exists in order to meaningfully plan and order it. CoServ stated that it did not desire the names of other CLECs using dark fiber, nor did CoServ have any interest or need to learn about SWBT's customer opportunities or business plan. CoServ stated that reasonable information about the location of dark fiber could be provided to it in a way that would not require revelation of SWBT's business plans.<sup>40</sup>

According to CoServ, *Waller Creek* provided that SWBT cooperate with the CLEC to determine the availability of dark fiber, which includes access to maps (Plant Location Records, or PLRs) and data showing such availability, as well as access to reports from the TIRKS database.<sup>41</sup> CoServ noted that SWBT claimed that it was not required to provide this type of information to CoServ regarding dark fiber, and further, that CoServ may obtain the information it is requesting from a worldwide repository called "CLONES."<sup>42</sup>

CoServ argued that CLONES could not be used to locate dark fiber. CoServ asserted that CLONES was designed to prevent duplication of CLLI codes between different carriers and that it was never intended to be a means of locating dark fiber. CoServ further explained that CLONES provides a unique CLLI code for each site, identifies the carrier that established the site, and will sometimes indicate the nature of the site. CoServ argued that CLONES provides no information as to whether there is any dark fiber at that site, or for that matter, any fiber at all.

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<sup>39</sup> *Id.* at 8.

<sup>40</sup> CoServ Ex. No. 6, Walker Rebuttal, at 17.

<sup>41</sup> CoServ Initial Post Hearing Brief at 68, citing *Waller Creek Arbitration Award* at 5-6, 8.

<sup>42</sup> *Id.*, citing SWBT Exhibit 4 (SWBT Ex. 4), Direct Testimony of Tim Oyer, at 12.

At best, CoServ explained, CLONES is an indicator useful for locating central offices, but limited when it comes to remote sites.<sup>43</sup>

CoServ stated that CLONES participation is entirely voluntary and that there is nothing to require SWBT to keep CLONES updated, or updated with accurate information in a highly competitive situation. CoServ argued there was no test for accuracy or omissions of the CLONES system. CoServ also believed that SWBT could decide to omit key data or use varying means of identification. In such situations, CoServ argued that it might be difficult and often impossible to identify which CLLI code is associated with which subscriber and what service is being provided.<sup>44</sup>

CoServ stated that it would like some documentation supporting SWBT's wishes to reserve dark fiber for its own use.<sup>45</sup> CoServ asked that the dark fiber inventory information requirements set forth previously by the Commission in the *Waller Creek* arbitration be followed. SWBT has asserted without any meaningful support that *Waller Creek* should not apply in this instance, but should apply with respect to the 25% limitation on available dark fiber. CoServ opined that either *Waller Creek* is valid Commission precedent or it is not – *Waller Creek* should not apply only where SWBT says it should.<sup>46</sup>

***(b) SWBT's Position***

SWBT argued it has no obligation to inventory its dark fiber or provide CLEC information about the location of dark fiber. Doing so involves revealing confidential or proprietary information.<sup>47</sup>

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<sup>43</sup> CoServ Ex. No. 6, Walker Rebuttal, at 18.

<sup>44</sup> *Id.* at 19.

<sup>45</sup> *Id.*

<sup>46</sup> CoServ Initial Post Hearing Brief at 68.

<sup>47</sup> Jt. Ex. 1, DPL, at Issue 40.

SWBT argued that most of the information CoServ is requesting from SWBT is readily available to CoServ. CLONES is a worldwide repository developed by Telcordia Technologies to provide the information that CoServ is requesting. The CLONES database has the Common Carrier Location Codes (CLLI) for SWBT as well as most other telecommunication providers.<sup>48</sup> SWBT stated that this is the same system SWBT uses to obtain CLLI codes and that all of the locations where SWBT has deployed equipment are in this database. This database allows licensees to search by responsible company, equipment type, geographic location, and many other criteria and will give users CLLI, address, town, name, and horizontal and vertical coordinates (where they are known) for Central Offices, RSMs, remote terminals, and customer locations. SWBT states that CoServ currently possesses a license to access and utilize this database to gather information it is requesting from SWBT.<sup>49</sup>

SWBT claimed that CoServ has recently added its request to access Plant Loop Records (PLRs).<sup>50</sup> SWBT explained that engineers use these records to find dark fiber for CLECs in response to an ASR submitted for a facility check. PLRs contain proprietary information that could be utilized by a CLEC to locate potential customers for targeting its marketing efforts, allowing it to target end users of other CLECs and SWBT. SWBT argued that it has no obligation to provide CoServ access to its detailed network plans and wholesale and retail customer information.<sup>51</sup>

SWBT stated that since the *Waller Creek* proceeding, SWBT's dark fiber inquiry process has evolved so that CLECs can request information regarding the availability of dark fiber through a standard ASR process. It also claimed that SWBT personnel have detailed procedures to follow in querying the applicable databases and records to determine whether dark fiber is available, utilizing all alternate routes.<sup>52</sup>

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<sup>48</sup> SWBT Ex. 4, Oyer Direct, at 12.

<sup>49</sup> *Id.* at 12-13.

<sup>50</sup> SWBT provided no specific date. However, it appears that CoServ added its request to access the PLRs after it filed its original petition in this proceeding.

<sup>51</sup> SWBT Exhibit 10 (SWBT Ex. 10), Rebuttal Testimony of Tim Oyer, at 5.

<sup>52</sup> *Id.* at 6.

SWBT asserted that some of the information CoServ is requesting contains privileged and confidential information pertaining to SWBT's network and customers. SWBT argued that providing CoServ with a detailed description of quantity and availability of dark fiber would provide CoServ a discriminatory advantage, revealing where SWBT had overbuilt its network to anticipate growth of large customers.<sup>53</sup>

SWBT maintained that it could not provide loss budget figures to CoServ. A loss budget is the maximum amount of signal degradation or loss that a network equipment element can tolerate before it becomes susceptible to errors or loss of signal. SWBT argued that electrical loss budget does not apply to fiber optic cable or to SWBT's dark fiber offering.<sup>54</sup> If, however, CoServ is seeking a preliminary optical loss calculation, which is based on the length of the fiber optic cable, SWBT argued that CoServ can make the calculations on its own behalf.<sup>55</sup>

*(c) Arbitrators' Decision*

*The Arbitrators find that SWBT is required to provide CoServ with the same information that was awarded to Waller Creek in the Waller Creek Arbitration Award. In the Waller Creek Arbitration Award, this Commission set certain guidelines for SWBT to follow in its provision of dark fiber information to CLECs.<sup>56</sup> The Arbitrators note that SWBT has indicated that its dark fiber inquiry process has evolved over time.<sup>57</sup> Given SWBT's continued development in its*

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<sup>53</sup> SWBT Ex. 2, Gonterman Direct, at 30.

<sup>54</sup> SWBT Ex. 4, Oyer Direct, at 13.

<sup>55</sup> *Id.* at 13-14.

<sup>56</sup> *Petition of Waller Creek Communications, Inc. for Arbitration With Southwestern Bell Telephone Company*, Docket No. 17922/20268 at 5. ("The Arbitrators conclude that SWBT must provide WCC access to PLRs indicating the location of fiber (actual maps and imaged/digitized versions through the Sun Workstations) at SWBT offices until such time as a dedicated Sun Workstation is permitted and established at each SWBT engineering location solely for CLEC use. In instances where the PLRs do not show the most recently completed fiber jobs in a geographic area, WCC will be advised of what facilities have been placed that are not reflected in the PLRs.")

<sup>57</sup> SWBT Ex. 10, Oyer Rebuttal, at 6. ("Since the Waller Creek proceeding, SWBT's dark fiber inquiry process evolved so that CLECs can request information regarding the availability of dark fiber through a standard ASR process, and SWBT personnel have detailed procedures to follow in querying the applicable databases and records to determine whether dark fiber is available, utilizing all alternate routes.")

*provision of dark fiber information to CLECs, along with the guidelines previously set forth by this Commission, the Arbitrators find that CoServ should at least be provided the same dark fiber inventory information that was awarded to Waller Creek.*

*With respect to SWBT's reluctance to be obligated to reveal confidential or proprietary information, the Arbitrators again rely on standards set forth in the Waller Creek Arbitration Award.<sup>58</sup> The Arbitrators find no reason why SWBT should be obligated to divulge confidential or proprietary information when releasing dark fiber inventory. Moreover, this Commission contemplated and ruled on this issue in the Waller Creek decision.<sup>59</sup> The Waller Creek decision essentially ruled against CLECs having direct access to SWBT's records; however, it did require SWBT to prepare reports from the TIRKS database, containing no confidential information, for requesting CLECs within five business days of the request. The Arbitrators find these standards to be in support of CoServ's request.*

*Therefore, the Arbitrators instruct the parties to formulate contract language to reflect the following:*

- 1. SWBT will provide CoServ access to PLRs indicating the location of fiber. This access must be reasonable and no different than what it provides to other CLECs.*
- 2. In instances where the PLRs do not show the most recently completed fiber jobs in a requested geographic area, SWBT is instructed to advise CoServ of what facilities have been deployed but are not reflected in the PLRs.*
- 3. Additionally, SWBT shall provide CoServ reports from the TIRKS database prepared by SWBT within 5 business days of a CoServ request. SWBT and CoServ shall abide by confidentiality agreements aimed at preventing either party from inappropriately using the competitively sensitive information shared between them. Within 90 days from the date of this order, SWBT and CoServ shall jointly file a report concerning*

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<sup>58</sup> Docket No. 17922/20268 at 8. ("With respect to access to the TIRKS database, the Arbitrators conclude that direct access by WCC is not appropriate given the proprietary and confidential data contained in TIRKS database.")

<sup>59</sup> Docket No. 17922/20268 at 8. ("...SWBT shall provide WCC reports from the TIRKS database prepared by SWBT within 5 business days of a WCC request.")

*the procedures that they have put in place to protect customer-specific dark fiber information.*

**OO. DPL ISSUE NO. 41**

**What constitutes “spare fiber?”**

*(a) SWBT’s Position*

SWBT argued that spare fiber did not include fiber documented as reserved by SWBT for utilization for growth within the 12-month period following the carrier’s request.<sup>60</sup>

SWBT argued that spare fiber did not include that fiber it has determined necessary for its use within the next 12 months.<sup>61</sup> SWBT stated that it has constructed its fiber facilities (and installed dark fiber) based on long term multi-year forecasted customer demands. SWBT deploys fiber optic terminal equipment based on its 12-month forecast. SWBT explained that it’s proposed contract language allows it to reserve fiber strands while a system is being designed, and multiplexing equipment is ordered and installed. SWBT argued that it could not deploy any fiber if CLECs could lease the fiber before the jobs were complete, resulting in the need to deploy more fiber, with no assurance that SWBT could actually use the fiber.<sup>62</sup>

SWBT argued that ¶ 352 of the UNE Remand Order specifically addressed situations in which the ILEC is required to reserve dark fiber for internal forecasted growth, thus excluding it from the unbundling requirements. SWBT stated that it is its responsibility to prove that the amount of dark fiber that is withheld from an unbundling offering is required for its forecasted growth. SWBT maintained that it has the right to reserve dark fiber that has been deemed necessary for its growth.<sup>63</sup>

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<sup>60</sup> Jt. Ex. 1, DPL, at Issue 41.

<sup>61</sup> SWBT Ex. 4, Oyer Direct, at 14.

<sup>62</sup> *Id.* at 16.

<sup>63</sup> SWBT Ex. 2, Gonterman Direct, at 32.